IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951.

No. 716

GEORGE S. MAY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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The Scheffer Press, Inc.—ANdover 3-6850

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PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, George S. May, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, entered in the above entitled cause on November 27, 1951, affirming a judgment of guilty in a contempt matter wherein a petition for rehearing was denied on January 21, 1952.

OPINIONS BELOW.

The judgment of the Criminal Court of Cook County, Illinois, (R. 11-13) is not reported. The opinion of the Supreme Court of Illinois (R. 24-32) is reported in 410 Ill. 618.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257, sub-section (3), wherein jurisdiction is conferred to review by Certiorari the final judgments of the highest courts of States, in causes wherein rights, privileges or immunities are specifically set up or claimed under the Constitution of the United States.

The Federal questions were presented in the respective State courts:

(1) In the Criminal Court of Cook County, in the Answer of George S. May to the Rule to Show Cause (R. 9, 10, 17, 19), invoking the protection of,

Constitution of Illinois, Art. II, Secs. 2, 6, and 10.
Constitution of the United States, 4th and 5th Amendments, Sec. 1 of 14th Amendment.

(2) In the Supreme Court of Illinois, in the Brief and Argument of Plaintiff in Error complaining of the violations by the trial court of, (R. 37).

Constitution of Illinois, Art. II, Secs. 2 and 10.
Constitution of the United States, 5th Amendment, Sec. 1 of 14th Amendment.

(3) In the Supreme Court of Illinois, in the petition for rehearing (R. 35, 36, 37, 45, 46), pointing out facts ignored, and misstated, in the opinion, and complaining of the violations of,

Constitution of Illinois, Art. II, Sec. 2 and Sec. 10.
Constitution of the United States, 5th Amendment, Sec. 1 of 14th Amendment.

The contentions of petitioner were overruled wherever presented, and the petition for rehearing was denied without comment (R. 46).

THE QUESTIONS PRESENTED ARE:

1. Was the petitioner deprived of his constitutional rights under the due process clause of Section 1 of the Fourteenth Amendment by the refusal of the State court of review to consider, pass upon or even mention basic undisputed questions of fact in the record of a contempt matter, wherein defendant was found guilty and punished, which refusal resulted in the withholding from his protection the applicable constitutional guaranties, statutory provisions, and established principles of law which require his discharge?

And further, was due process violated by said State court in distorting and misstating other material undisputed facts in the record, with like results?

2. Is petitioner deprived of his property without due process of law in violation of Section 1 of the Fourteenth Amendment, when punished by the State court under a judgment for contempt in failing to produce books and records demanded by a grand jury subpoena, where such subpoena,

(a) Contains in the *duces tecum* clause a "catch-all" provision held by this Court to invalidate the subpoena;

(b) Contains an *ad testificandum* clause forbidden by the State Constitution and State statute;

(c) Is so broad in scope as to violate the State Constitution and the established law;

(d) Where the State court of review disposed of the complaints by holding the invalid portions to be mere surplusage.

3. Is petitioner deprived of his property without due process of law in violation of Section 1 of the Fourteenth

Amendment, when the State court of review affirms a judgment punishing him for contempt in failing to produce before the grand jury under a subpoena *duces tecum* the alleged books and records of a corporation, which would prove his guilt of criminal charges then pending against him before said grand jury, where it appears without contradiction:

(a) That the corporation was not served with the subpoena;

(b) That no officer or agent of the corporation was served as such;

(c) That the witness was served only as an individual;

(d) That the subpoena contained both an *ad testificandum* clause and a *duces tecum* clause;

(e) That such witness was charged on the grand jury docket with violations of the criminal laws;

(f) Where such witness did not have possession of said books and documents;

(g) Where such witness after receiving the subpoena diligently and carefully searched all rooms in the club house and all other buildings at the country club, and inquired of the officers and other persons at the country club as to the location and whereabouts of said books and records, and was unable to find any of said books and records, and was unable to learn from any inquiry the whereabouts or location of them;

(h) Where such witness in his sworn answer proved that he was not able to comply with said subpoena; that he did not have the custody or possession of any of said books or records; that he was not responsible for their unavailability; and that he was not impeding justice, and explained what happened to said books and records.

And shall the doctrine of the *Wilson* case (221 U. S. 361) be extended to include such situations.

4. Is it a violation of the due process clause of Section 1 of the Fourteenth Amendment for a State to punish a man charged with specific crimes before a grand jury, because he, a witness served as an individual with a subpoena, has not obtained alleged books and documents of a corporation tending to incriminate him, which were not in his possession but in the sole and exclusive possession of a stranger to the corporation, he not being responsible for their unavailability, and the corporation never having been served with the subpoena?

5. Is the due process clause of Section 1 of the Fourteenth Amendment violated by a State in having a subpoena *duces tecum* served upon an individual perform the function of a search warrant, when a search warrant under the same set of facts and circumstances would be unconstitutional?

STATEMENT (Condensed).

(For detailed Statement see Appendix B, page 3a).

July 14, 1950, in a matter entitled *People of the State of Illinois* v. *George S. May,* known as Grand Jury Docket No. 96, petitioner was charged upon the docket of the Cook County, Illinois, grand jury with violations of two specified sections of the Criminal Code (R. 4, 9).

A statute of Illinois prohibits the calling of any person charged with crime as a witness in any criminal proceedings except at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734).

Petitioner did not request that he be called as a witness in said matter.

July 28, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court a petition for an order authorizing the issuance of a grand jury subpoena (*ad testificandum* and *duces tecum*) in said Grand Jury Docket No. 96, directed to Tam O'Shanter Country Club, a corporation, George S. May, and others, individually, entitling the petition as *People of the State of Illinois* v. *George S. May* (R. 1-2).

On the same day an order was entered for the issuance of a subpoena as described in said petition (R. 3).

August 3, 1950, there was filed in the Clerk's Office of said Criminal Court a printed and typewritten grand jury subpoena bearing date July 28, 1950, issued in Grand Jury Docket No. 96, directed to Tam O'Shanter Country Club, George S. May, and others, and returned as having been served on George S. May, only as an individual (R. 4).

Said subpoena contained both an *ad testificandum* clause and a *duces tecum* clause (R. 4).

Said subpoena stated that it was issued in Grand Jury Docket No. 96, and was entitled *People of the State of Illinois* v. *George S. May,* and commanded George S. May to appear forthwith before said grand jury to testify, and to bring with him certain specified documents and records, concerning "a certain complaint before said grand jury against George S. May," (R. 4), and by said subpoena he was commanded to testify and to produce documentary evidence against himself.

Said subpoena was not served upon Tam O'Shanter Country Club, a corporation, nor upon any officer or agent of said corporation as such, but upon George S. May individually (R. 4).

Said subpoena was so broad in scope that it commanded the production of practically all the records of Tam O'Shanter Country Club, a corporation (R. 2, 4, 5, 7).

Said subpoena also contained a "catch-all" provision similar to the one held invalid in *Bowman Dairy Co.* v. *United States,* 341 U. S. 214, 221 (1951) (R. 4, 7).

August 3, 1950, on a verified petition of the Foreman of the Grand Jury, a Rule was entered in the Criminal Court upon George S. May to show cause why he should not be punished for contempt of court in failing to obey the subpoena (R. 6).

August 22, 1950, George S. May filed his sworn answer to the Rule in which he set forth the above facts, alleged the invalidity of all the proceedings and the subpoena, as being violative of his rights as guaranteed by the Constitution of Illinois, Sec. 6 of Art. II, and asserting that to compel him to testify, and to produce said books and records as demanded would deprive him of liberty and property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article II, of the Constitution of Illinois (R. 9).

Respondent answered further that after receiving said subpoena he diligently and carefully searched all rooms in the Club House and all other buildings and structures at the Tam O'Shanter Country Club, and inquired of the officers and other persons at said country club, for the location and whereabouts of said books and records; that he was unable to find any of said books or records, and was unable to learn from any inquiry the whereabouts or location of any of said books or records; that he has been informed, and states the fact to be, that James Ryan

(August 21, 1950) filed in the office of the Clerk of the Criminal Court a verified answer in which he states that he has the sole and exclusive possession of said books and records mentioned in said subpoena, and that no other person has access to, or knowledge as to the location of, said books and records; and that this respondent was and is, and through no fault of his, unable to bring before said grand jury the books and records mentioned in said subpoena (R. 8, 25-26).

June 7, 1951, an order and judgment was entered in the Criminal Court of Cook County, finding George S. May guilty of contempt and imposing punishment.

On writ of error to the Supreme Court of Illinois, that court affirmed the judgment, ignoring, and not even mentioning the fact that George S. May was a named defendant in said Grand Jury Docket No. 96, charged with crime, disregarding the fact that the subpoena was never served upon the corporation, Tam O'Shanter Country Club, nor upon any officer or agent of said corporation as such; ignoring the fact that the subpoena contained an *ad testificandum* clause and holding that the "catch-all" phrase, and other provisions of said subpoena that were bad were mere surplusage not invalidating the remaining parts of the subpoena, on the authority of two other cases decided by it on the same day (R. 30).

A petition for rehearing was filed in the Supreme Court of Illinois, in which many of the omissions and misstatements were specifically pointed out, and complaining that the law applicable to the facts in the record was disregarded, resulting in erroneous conclusions (R. 33-46), and contending that the omissions, misstatements and erroneous conclusions rendered the judgment of the Criminal Court, and its affirmance, a violation of the due process

clauses of Article II, Section 2, of the Constitution of Illinois, and the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 33-46).

The petition for rehearing was denied January 21, 1952 without comment (R. 46).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Illinois erred:

1. In ignoring, and thereby failing to consider, or mention, the basic undisputed fact in the record, that George S. May was a named defendant in a specific criminal charge placed against him upon the docket of the July, 1950, grand jury before any subpoenas were issued in said matter.

2. In ignoring and failing to even mention the fact that George S. May was commanded to appear and testify before said grand jury against himself.

3. In failing to hold, that under the common law a defendant charged with crime was an incompetent witness in said matter, and could not be called to produce evidence or testify therein.

4. In denying to petitioner the protection of Paragraph 734 of the Criminal Code of Illinois, which declares that where a person is charged with crime the court and grand jury are prohibited from calling him as a witness in said matter, except at his own request.

5. In failing to hold that George S. May did not request that he be made a witness in said grand jury proceedings.

6. In denying to petitioner the constitutional and statutory protection, that a person charged with crime upon

the docket of a grand jury cannot be compelled by subpoena to produce evidence or testify against himself.

7. In denying to petitioner the protection of the doctrine, that the issuance of a grand jury subpoena to a person charged with crime upon the docket of said grand jury, commanding him to testify and to produce evidence in said matter, and the service of such subpoena, are in violation of the constitutional and statutory rights of such person, and violate the due process clause of Article II, Section 2, of the Constitution of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. In affirming the judgment of the Criminal Court of Cook County, adjudging petitioner guilty of contempt of court and inflicting punishment, for his failure and refusal to produce evidence before the grand jury in a matter wherein he is charged with specific crimes, and thus depriving him of liberty without due process of law, in violation of his constitutional rights as guaranteed by Article II, Section 2, of the Constitution of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. In finding petitioner guilty of contempt for his failure to obtain books and records in the possession of some third person, not an officer of the corporation, and to bring before the grand jury such books and records, containing evidence which would tend to incriminate him in a matter wherein he was charged with crime.

10. In holding that the "catch-all" provision in the *duces tecum* clause of a grand jury subpoena is mere surplusage, leaving the remainder valid and enforceable.

11. In holding that in a grand jury subpoena *duces tecum*, a demand in general terms for all, or even a substantial part, of the records, does not invalidate the subpoena.

12. In holding that a grand jury subpoena containing an *ad testificandum* clause, which is forbidden by the State Constitution and State Statute, does not result in total invalidity of a subpoena which also contains a *duces tecum* clause.

13. In holding that a grand jury subpoena containing a *duces tecum* clause, though invalid in part, is enforceable as to the remainder.

14. In holding that a witness served with a grand jury subpoena invalid in part, must cull the good from the bad and determine at his peril what is good and what is bad.

15. In holding that a witness served with a forthwith grand jury subpoena containing an *ad testificandum* clause and a *duces tecum* clause, which is invalid in whole or in part, must appear before the court which issued it and move that it be quashed, vacated, or amended, otherwise he may be punished for failure to obey the subpoena.

16. In failing and refusing to hold that petitioner was served with the subpoena only as an individual.

17. In holding that the facts in this case are similar to the facts in the cases of *Wilson* v. *United States*, 221 U. S. 361; *United States* v. *Bryan*, 339 U. S. 323, and *United States* v. *Fleischman*, 339 U. S. 349, and the *Ryan* and *Allen* cases decided by the same court on the same day as the instant case.

REASONS FOR GRANTING THE WRIT.

I.

(a) The Supreme Court of Illinois, in reviewing the judgment in the instant case, ignored and refused to consider the undisputed basic fact in the record that placed the petitioner under the protection of the Constitution of Illinois, the Statute of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The basic undisputed fact thus ignored and not mentioned or considered is:

On July 14, 1950, the matter of *People of the State of Illinois* v. *George S. May* on charges of keeping gambling devices in violation of Sections 341 and 343 of the Criminal Code of Illinois, was placed upon the docket of said grand jury and became known as Grand Jury Docket Number 96 (R. 4, 9).

Petitioner being so charged with crime was placed under the protection of the constitutional guaranty against self-incrimination (Constitution of Illinois, Art. II, Sec. 10). Paragraph 734 of the Criminal Code of Illinois prohibited his being called as a witness except at his own request, and he never made such request.

The Supreme Court of Illinois, by ignoring said fact, denied to petitioner the protection of the Constitution and Statute, and deprived him of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

As the defendant in the case of *In re Oliver,* 333 U. S. 257, decided in 1947, was sent back to jail by the Supreme

Court of Michigan without that court ever having seen a record of the proceedings, and without knowing all that took place at the trial, so the Supreme Court of Illinois, in the case at bar, although the record was before it, affirmed the judgment without even having mentioned or considered the basic fact therein.

The failure to consider the entire record is held in the *Oliver* case as violative of due process of law.

The question presented is of importance because the decision of the Supreme Court of Illinois results in the promulgation of a principle that a reviewing court may disregard undisputed basic facts presented and repeatedly urged.

The omission of the Supreme Court of Illinois to even mention in its opinion the undisputed basic fact in the record, is tantamount to a concealment thereof, resulting in the denial of a public hearing, held in the *Oliver* case to be violative of due process of law.

(b) The State Supreme Court in the instant case, though in the opinion recognizing the authority of *United States* v. *Bryan*, 339 U. S. 323, and *United States* v. *Fleischman*, 339 U. S. 349, by ignoring undisputed basic facts in the record of the case at bar, and by misstating and distorting other undisputed basic facts therein, declare that the above cited cases "involve situations similar to that presented in the case at bar," and thus pervert the announced doctrine of those cases.

Some of the undisputed facts in the record ignored and disregarded in the instant case, appear from the comparative analysis following:

Bryan and Fleischman Cases	Instant Case
1. No criminal charges pending against either.	Criminal charges against May pending on grand jury docket.
2. No statute forbidding calling either defendant as witness available.	Illinois statute forbids calling as witness any person charged with crime (Ill. Rev. Stat. Chap. 38, Par. 734).
3. Federal immunity Statute protected both defendants against prosecution.	No immunity statute applicable.
4. Subpoena did not require either witness to testify in any matter pending against herself.	Subpoena commanded May to testify in complaint against himself.
5. Both members of Executive Board, and Bryan had possession of books as Executive Secretary of Board.	May not shown to be member of any executive board, and had no custody or possession of books in any capacity.
6. Respondents served as "Members of Executive Board."	Subpoena served on May only as individual.
7. Subpoena served on legal custodian of books.	No subpoena served on Weismann, secretary, as legal custodian. Nor on corporation, nor on any officer as such.
8. Executive Board, and each member acting with the others, had power and authority, to control books, to direct Executive Secretary, and to remove her from office.	May had no custody or right to custody, either legal or actual, nor control, alone or with others, over person having possession of books.
9. No constitutional protection claimed against self-incrimination.	Constitutional protection against self-incrimination raised and urged throughout proceedings.

The refusal of the court to state fairly the material, undisputed facts in the record constitutes a deprivation of due process of law as guaranteed by Article II, Section 2, of the Constitution of Illinois, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The question is of importance, because the instant case establishes a method for courts of review to violate and destroy claimed constitutional rights and immunities, by the simple expedient and easy subterfuge of ignoring undisputed basic facts in the record, while ostensibly riding on the authority of the Supreme Court of the United States.

II.

The decision of the State Supreme Court in the instant case is directly in conflict with the doctrine of *Bowman Dairy Company* v. *United States,* 341 U. S. 214, decided in 1951 in a contempt proceeding, that a subpoena containing a *duces tecum* clause which is bad in part is bad in its entirety; that the burden is upon the court to see that the subpoena is good in its entirety, and that it is not upon the person who faces punishment to cull the good from the bad.

The record presents three separate and distinct points wherein the decision of the instant case conflicts with said doctrine.

(a) In the opinion of the State court it is held that the subpoena involved is identical with the subpoena in the *Ryan* case (R. 30), and is disposed of by what was there said; and in said *Ryan* case cited as its authority, the same court, on the same day, disposed of the contention of petitioner, that the doctrine of the *Bowman Dairy Company* case (341 U. S. 214), should rule *viz.,* that the "catch-all" provision vitiated the instrument as a whole, by saying, (410 Ill. page 496): "In our opinion the inclusion of an improper item in a subpoena *duces tecum* does not result in total invalidity so that a witness thereby escapes the obligation of complying with any portion of it."

The decision is directly in conflict with *Bowman Dairy Company* v. *United States,* 341 U. S. 214, 221, decided in 1951 in a contempt proceeding, wherein it was held that a similar phrase in a subpoena *duces tecum* is invalid, and renders the subpoena bad in its entirety; that the burden is upon the court to see that the subpoena is good in its entirety, and it is not upon the person who faces punishment to cull the good from the bad.

The "catch-all" phrase contained in the subpoena involved in the instant case, following the enumeration of substantially all the books and records of Tam O'Shanter Country Club, a corporation, for a period of eighteen months, reads:

> "together with all copies, drafts and vouchers relating to said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said matter." (R. 2, 4, 7, 24, 25).

The authorities cited in the *Ryan* opinion of the State court in support of its holding, do not any of them involve a subpoena *duces tecum*. Those authorities involved appealable orders of court entered, usually in receivership proceedings, wherein the propriety of the orders entered was not challenged by review, and in contempt proceedings for refusal to obey the orders, the attack thereon was collateral.

The authorities cited, and the holding of the State court in the *Ryan* case are directly in conflict with the doctrine announced and applied in the following cases, wherein it was held that when an order is entered for the production as evidence of books, records and documents, if the party against whom the order is made wishes to contest the validity of the order he may refuse to obey and in a prosecution for contempt show in defense that the court had no authority to make the order.

Lester v. *Berkowitz,* 125 Ill. 307, 308 (1888).
Lester v. *People,* 150 Ill. 408, 416 (1894).
Carden v. *Ensminger,* 329 Ill. 612, 620 (1928).

The statement in the opinion of the *Ryan* case (410 Ill. 496) that "There was no challenge directed to this printed portion of the subpoena in the trial court," is contrary to the record.

With respect to the proposition herein presented, this is not an isolated case. The "catch-all" phrase has been, and is now being, incorporated in every subpoena *duces tecum* issued by the Criminal Court of Cook County. It has been printed into the subpoena as a standard clause (410 Ill. 496). It is in general use in State courts throughout the country. The opinion of the State court in said *Ryan* case points out that the doctrine of the *Bowman Dairy Company* case (341 U. S. 214, 221) may be disregarded and ignored, insofar as the State of Illinois is concerned. That judgment is approved in the instant case.

(b) Regarding the contention of petitioner, that the subpoena is so broad in scope as to amount to an unreasonable search and seizure, it is held in the opinion that the instant case is governed by *People* v. *Allen,* No. 31947, decided the same day (410 Ill. 508), and *People* v. *Ryan,* No. 31781, decided the same day (410 Ill. 486) (R. 30) and in said *Ryan* case it is held (Page 495) that the demand is not unreasonable in view of the subject under investigation.

The decision in the instant case like that in the *Ryan* case, is directly in conflict with *Hale* v. *Henkel,* 201 U. S. 43, 71, 76, 77 (1905); *Boyd* v. *United States,* 116 U. S. 616, 622 (1886); and *People* v. *Reynolds,* 350 Ill. 11, 20 (1932); all of which cases involved subpoenas *duces tecum;* and also in conflict with the principle announced and applied in the cases of *Lester* v. *People,* 150 Ill. 408, 416 (1894) and *Carden* v. *Ensminger,* 329 Ill. 612, 620 (1928).

The language of the dissenting opinion in the *Ryan* case is apropos: that the subpoena *duces tecum* in the scope of its demand "is unreasonable and constitutes a flagrant abuse of the judicial process. See *Hale* v. *Henkel,* 201 U. S. 43." (*People* v. *Ryan,* 410 Ill. 486, 502).

(c) Petitioner contends that said subpoena having an *ad testificandum* clause, as well as a *duces tecum* clause, in a grand jury matter charging petitioner with specific criminal offenses, wherein the Constitution and Statute of the State of Illinois forbid his being called as a witness against himself, the inclusion of the *ad testificandum* clause therein rendered the subpoena bad in its entirety, under the doctrine of the *Bowman Dairy Company* case.

We have been unable to find any instance wherein the above proposition had been presented to, or passed upon by, any Federal or State court of review, except the case of *People* v. *Ryan,* 410 Ill. 486, decided by the same court on the same day.

Prior to the issuance of the subpoena, petitioner had been charged upon the docket of said grand jury with the violation of specific sections of the Criminal Code of Illinois (R. 4, 9).

Under the common law petitioner was an incompetent witness in a criminal matter wherein he was the named defendant charged with offenses. The Constitution of Illinois guaranteed him immunity from being compelled to testify (Const. of Ill., Art. II, Sec. 10). The Statute of Illinois, partially removing the common law incompetency, provided that he could be called as a witness, but only at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734). He made no request to be called in said matter.

The decision in the instant case is directly in conflict with *Boone* v. *People,* 148 Ill. 440, 448 decided in 1894, never overruled but cited with approval, announcing the doctrine that,

> "The provision of the statute and the positive inhibition of the constitution alike preclude the right of the grand jury, or any court, to call upon the de-

fendant, and, in the first place make him a witness, and require him to give evidence against himself."

The same doctrine has been recognized and applied in:

State v. *Gardiner,* 88 Minn. 130; 92 N.W. 529, 533.

People v. *Bermel,* 128 New York Supp. 524, 525, 526.

People v. *Gillette,* 126 App. Div. (N.Y.) 665, 667, 668, 670.

State v. *Naughton,* 120 S.W. Rep. 53, 64; 221 Mo. 398.

United States v. *Edgerton,* 80 Fed. Rep. 374, 375, 376.

The decision in the instant case is in conflict with the principle of *Bowman Dairy Company* v. *United States,* 341 U. S. 214, 221, decided in 1951, that a subpoena bad in part is bad in its entirety.

In the opinion of the *Ryan* case cited as authority for the judgment in the instant case, however, the Supreme Court of Illinois seeks to distinguish the application of the *Bowman Dairy Co.* case by stating that it is important to note that the offending clause in that case survived a motion to quash in the trial court and that a witness faced with a subpoena *duces tecum* which he believes to be invalid in whole or in part has the opportunity to appear before the court which issued it and move that it be quashed, vacated, or amended (410 Ill. 486, 496).

There is a sharp and clear distinction between, "Being called as a witness where the examination is directed against the acts of others, * * * and being called as a witness where the proceeding is directed against the witness himself." In the latter case there is no power to administer the oath. It has been so held in the case of

People v. *Gillette,* 126 App. Div. (N. Y.) 665, 668, wherein it is further stated (p. 670):

> "A person against whom the inquiry of the grand jury is directed should not be required to attend before that body, much less be sworn by it."

The Supreme Court of Illinois refused to apply this doctrine, because they had disregarded the basic undisputed fact in the record from which it springs, that petitioner was himself under investigation by that grand jury. In the instant case the subpoena as to the petitioner was void and lifeless *ab initio,* and thereafter no act or omission of his could give it vitality.

The point that a forbidden *ad testificandum* clause in a subpoena renders the entire subpoena invalid, was not presented, and was not involved in *Wilson* v. *United States,* 221 U. S. 361; *Wheeler* v. *United States,* 226 U. S. 478; *Esgee Co.* v. *United States,* 262 U. S. 151; *United States* v. *White,* 322 U. S. 694, and other similar cases, cited by the Supreme Court of Illinois in support of the judgment in the *Ryan* case because in those cases the subpoenas did not contain *ad testificandum* clauses. Neither did the subpoena in the *Bowman Dairy Company* case contain an *ad testificandum* clause. Likewise the point was not involved in *Hale* v. *Henkel,* 201 U. S. 43, *United States* v. *Bryan,* 339 U. S. 323, *United States* v. *Fleischman,* 339 U. S. 349, and cases of that type, because there the witness was protected by an immunity statute, and a valid subpoena could issue for him to testify. In Illinois there is no applicable immunity statute.

Petitioner contends that the decision in the instant case is erroneous, and that it should be governed by the doctrine of the *Bowman Dairy Company* case. The doctrine there announced establishes a uniform principle of

law applicable to proceedings in Federal and State courts throughout the nation; and this Court is asked to decide whether the uniformity of that principle may be destroyed by a State court of review.

III.

The decision of the Supreme Court of Illinois in the instant case extends the doctrine of *Wilson* v. *United States,* 221 U. S. 361 (1910), to undisputed facts which are not only dissimilar, but contrary to the facts of the *Wilson* case, and thereby deprives the petitioner of his property in violation of the Constitution of Illinois, and the due process clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The opinion of the Supreme Court of Illinois states that the instant case as to "the contentions concerning the validity of the petitions for the issuance of the subpoenas and the privilege against self-incrimination are disposed of by what was said in *People* v. *Ryan, ante,* page 486, (410 Ill. 486), decided today, which involved an identical subpoena. The contention concerning unreasonable search and seizure is disposed of by what was said in *People* v. *Allen, ante,* page 508, also decided today, and in *People* v. *Ryan, ante,* page 486." (R. 30). And in the opinion of *People* v. *Ryan,* 410 Ill. 486, thus referred to, it is stated by the same court that that case is ruled by the doctrine of *Wilson* v. *United States,* 221 U. S. 361, decided in 1910.

In said *Wilson* case it is announced that corporate documents and records held by the witness as an officer of the corporation, where such corporation has been served with the subpoena, are not within the protection of the constitutional guaranty against self-incrimination.

The Supreme Court of Illinois in the opinion of the instant case, quoting from *Wilson* v. *United States,* 221 U. S. 361, states (R. 31) that

> "A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs."

Said State court failed to comprehend that there can be no command to a corporation unless a writ containing the command is served upon it.

The difference in the facts of the *Wilson* case and the undisputed facts in the instant case may be summarized as follows:

Wilson case	*Instant case*
The corporation was served.	Corporation not served.
Officers served as such.	No officer served as such.
Wilson not served as an individual.	May served only as individual.
No *ad testificandum* clause.	*Ad testificandum* clause included.
Records held by Wilson in official capacity.	No records held in any capacity.
Wilson, as officer, held in contempt for preventing corporate compliance with subpoena.	May punished for personally failing to obtain alleged corporate records from stranger to corporation.

Heretofore the Supreme Court of Illinois has held in *People* v. *Zazove,* 311 Ill. 198 (1924), that incriminating papers in the sole possession of the defendant, although not made by him, nor belonging to him, were under the protection of the constitutional guaranty.

In the instant case the holding is to the contrary, on the authority (as it is stated) of the *Ryan* case decided the same day, and which is ruled (as it is stated) by the *Wilson* case.

The question presented is of importance and arises almost daily in the administration of the criminal laws by the various States, and by the United States; and involves the constitutional guaranties against self-incrimination of witnesses subpoenaed to produce incriminating documents and effects before grand juries and courts.

The instant case appears for the first time to present the question wherein the witness served with a subpoena *duces tecum* as an individual, did not have possession of the demanded documents as a corporate official, nor in any capacity.

The dissenting opinion in the *Ryan* case, in analyzing the doctrine of the *Wilson* case concludes (410 Ill. 505) that "The decision in the *Wilson* case was based upon the corporation's duty to produce its records or books, and emphasis was placed upon the facts that at all times Wilson was subject to the direction of the corporation and that the books were under its control." • • • "If control by the corporation is the reason for denying a person the protection he would otherwise have against being compelled to produce documents in his possession which would incriminate him, it becomes highly important to inquire into the existence and extent of such control in the particular case." • • •

IV.

The decision of the State Supreme Court in the instant case inaugurates a method of procedure for the issuance and service of a subpoena *duces tecum* compel-

ling the production by an individual of papers and effects of a corporation not in his possession, but which would incriminate him of charges then pending before the grand jury, without the necessity of serving said subpoena upon the corporation, and without the necessity of an application upon oath or affirmation, and without an order of court, for the issuance of the subpoena against him as an officer or agent of said corporation.

In the instant case there was no petition or application filed, and no order entered, for the issuance of a subpoena *duces tecum* directed to George S. May as an officer or agent of a corporation, commanding him as such officer or agent to produce before the grand jury documentary evidence.

The decision is directly in conflict with the previous decisions of the Supreme Court of Illinois and this Court wherein it has been held consistently that a subpoena *duces tecum* is equivalent to a warrant of search and seizure.

Section 6 of Article II of the Constitution of Illinois is in substantially the same language as the Fourth Amendment to the Constitution of the United States, in that both prohibit the issuance of a search and seizure warrant, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized. (Sec. 6 of Art. II of the Constitution of Illinois; Fourth Amendment to the Constitution of the United States; *People* v. *Brocamp,* 307 Ill. 448, 452-453 (1923), and should receive the same construction, *People* v. *Reynolds,* 350 Ill. 11, 16 (1932).

Section 10 of Article II of the Constitution of Illinois, in providing that no person shall be compelled in any

criminal case to give evidence against himself, is similar to the Fifth Amendment to the Constitution of the United States. (Sec. 10, Art. II of the Constitution of Illinois; Fifth Amendment to the Constitution of the United States; *People* v. *Brocamp,* 307 Ill. 448, 453); and should also receive the same construction.

It was held in *Hale* v. *Henkel,* 201 U. S. 43, 76, 77 (1905), and also in *People* v. *Reynolds,* 350 Ill. 11, 18 (1932), that in wrongfully obtaining incriminating evidence, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpoena *duces tecum,* against which the person is entitled to protection. In *Boyd* v. *United States,* 116 U. S. 616, 622 (1886), it was held that a compulsory production of a man's private papers to establish a criminal charge against him, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; and on page 633 it was held that compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, is an unreasonable search and seizure condemned by the Fourth Amendment.

The question presented is of importance in the administration of the criminal laws of the various States, because in nearly every State of the Union the constitutional provisions against unreasonable search and seizure, and against self-incrimination, are alike. Almost daily a person under investigation by a State grand jury is commanded by a subpoena to appear and testify before such grand jury, and to bring with him designated books, records, documents, papers and effects.

Petitioner contends that the decision of the Supreme Court of Illinois is erroneous in failing and refusing to

hold that the subpoena as to its *duces tecum* clause must have applied to it the same constitutional provisions and the same laws as a search warrant against an individual.

CONCLUSION.

Petitioner prays that for the foregoing reasons, this petition for a Writ of Certiorari be granted.

Respectfully submitted,

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C. VERNON THOMPSON,
Counsel for Petitioner.

April 17, 1952.

APPENDIX A.

Constitution of the United States:

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. * * * Nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment XIV, Sec. 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Illinois:

Art. II, Sec. 2. No person shall be deprived of life, liberty or property, without due process of law.

Art. II, Sec. 6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

Art. II, Sec. 10. No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense.

Statutes:

Ill. Rev. Stat. (1951) Chap. 38 Par. 734:

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, * * * Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, * * *

APPENDIX B.

STATEMENT.

July 14, 1950, in a matter entitled People of the State of Illinois v. George S. May, known as Grand Jury Docket No. 96, petitioner was charged upon the docket of the Cook County, Illinois, grand jury with violations of two specified sections of the Criminal Code (R. 4, 9).

A statute of Illinois prohibited the calling of any person charged with crime as a witness in any criminal proceedings except at his own request (Ill. Rev. Stat. (1951), Chap. 38, Par. 734).

Petitioner did not request that he be called as a witness in said matter.

July 28, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court of Cook County a verified petition, entitled People of the State of Illinois v. George S. May, (R. 12) requesting the entry of an order for the issuance of a subpoena commanding Tam O'Shanter Country Club, and George S. May and others individually, to attend before said grand jury and to testify and give evidence in said Grand Jury No. 96, and then and there to produce certain enumerated books, records and documents, to-wit:

(a) All records showing cash receipts of Tam O'Shanter Country Club for period of January 5, 1949, to July 5, 1950.

(b) All records showing cash disbursements of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(c) All records showing cash receipts received by Tam O'Shanter Country Club for period of January 5, 1949

to July 5, 1950, from operation of Coin Machines, including Slot Machines and Gambling Games.

(d) General Ledger of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(e) All records showing Accounts Receivable and Accounts Payable of Tam O'Shanter Country Club for period of January 5, 1949 to July 5, 1950.

(f) All records showing accounts of each member belonging to Tam O'Shanter Country Club for the last three years. (R. 1-2)

July 28, 1950, an order was entered in said cause in the Criminal Court directing the issuance of a subpoena to Tam O'Shanter Country Club and George S. May and others individually, as prayed for in the foregoing petition. (R. 3)

August 3, 1950, there was filed in the Clerk's Office of the Criminal Court of Cook County a printed and typewritten subpoena bearing date July 28, 1950, addressed to Tam O'Shanter Country Club and George S. May and others individually containing, an *ad testificandum* clause and a *duces tecum* clause, commanding him to appear before the Cook County grand jury forthwith and to testify and give evidence concerning "a certain complaint made before said Grand Jury against George S. May," and to bring the books, records and documents specified in the petition above, "together with all copies, drafts and vouchers relating to said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said matter," on the reverse side of which subpoena appears the return of the sheriff showing service on George S. May as individual only and no service on the corporation nor any officer thereof as such.

August 3, 1950, the State's Attorney presented to the Chief Justice of the Criminal Court a verified information by the foreman of said grand jury, in which he alleged the entry on July 14, 1950 upon the docket of said grand jury as docket No. 96, the matter entitled *People of the State of Illinois* v. *George S. May* charging said May with the violation of two specified sections (R. 4) of the Criminal Code of Illinois; the issuance of the subpoena for George S. May, (R. 5); how the books and records demanded would incriminate George S. May (R. 5, 6); and praying for a Rule upon George S. May to show cause why he should not be held in contempt of court for his failure to produce said books and records (R. 6).

August 3, 1950, an order was entered in said court that George S. May show cause why he should not be punished for contempt of court for having failed to produce before the court and the July, 1950 grand jury, the books and records of Tam O'Shanter Country Club, a corporation, as set forth in the subpoena *duces tecum,* the answer to be filed on or before August 22, 1950, and the hearing set for August 24, 1950 (R. 6, 7).

August 22, 1950, defendant filed his sworn answer to the Rule to Show Cause, stating the service upon him of the subpoena on July 29, 1950; that he was not served with any subpoena at any other time, describing the subpoena as containing an *ad testificandum* clause and a *duces tecum* clause commanding him to produce before said grand jury the books and records mentioned in the petition aforesaid,

> "together with all copies, drafts and vouchers relating to said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said matter." (R. 7).

In the answer the petitioner further said that after receiving said subpoena he did, diligently and carefully search for, examine and inquire after the books and records mentioned in said subpoena; that he did diligently and carefully search all rooms in the Club House at the Tam O'Shanter Country Club, and all other buildings and structures thereat; that he inquired of the officers and other persons at said country club, for the location and whereabouts of said books and records mentioned in said subpoena; that he was unable to find said books and records, or any of them, and that he was unable to learn from any inquiry the whereabouts or location of said books and records, or any of them; that he has been informed, and upon such information verily believes, and states the fact to be, that one James Ryan has filed in the office of the Clerk of the Criminal Court of Cook County, Illinois, a verified answer in which he states that he has the sole and exclusive possession of said books and records, mentioned in said subpoena, and that no other person has access to, or knowledge as to the location of, said books and records; and that this petitioner was and is, through no fault of his, unable to bring before said grand jury said books and records mentioned in said subpoena. (R. 8).

In said verified answer the defendant (George S. May) further asserts that the petition for the issuance of said subpoena is insufficient to give the court jurisdiction to enter the order; that the order directing the subpoena to issue is illegal and void; that the subpoena is illegal and void; that the service of said subpoena was irregular and void; that all proceedings upon which said subpoena is predicated, and said subpoena are in violation of the constitutional rights of respondent as guaranteed by the Fourth Amendment to the Constitution of the United

States, Section 6 of Article II of the Constitution of Illinois; and the enforcement of said subpoena and the punishment of this respondent for contempt of court would deprive respondent of liberty and property without due process of law, contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article II of the Constitution of Illinois (R. 9).

Respondent further answered that to compel him to answer questions before the grand jury and the court, in said criminal proceeding, which might incriminate him, or to produce said books and records as demanded by said subpoena would violate the constitutional rights of respondent as guaranteed by the United States Constitution and the Constitution of Illinois (R. 9).

The answer then sets forth the contents of the verified petition of the foreman of said grand jury; that he had been charged upon the grand jury docket with violations of the criminal laws of Illinois; the statements in said petition of the foreman of said grand jury wherein he says that said books and records would incriminate respondent (R. 10), and that the statements contained in said verified petition of the foreman of said grand jury, together with other statements contained in said petition, lead to the conclusion and respondent therefore believes and asserts that said books and records demanded in said subpoena contain matters which if produced would tend to incriminate respondent, and that the forced production of said books and records by respondent, in said criminal proceeding, as demanded, would be compelling respondent to give evidence against himself in a criminal proceeding in violation of his constitutional rights as guaranteed by Section 10 of Article II of the Constitution of Illinois, and the Fifth Amendment to the Constitution of the United States (R. 10).

Respondent prays that he may be purged of contempt and the Rule to Show Cause be discharged. (Rec. 10).

June 7, 1951, the judgment was entered in the Criminal Court stating that the court considered the information of Garner Williams, foreman of the July 1950 grand jury, the rule to show cause entered August 3, 1950, the sworn written answer of the respondent, George S. May, and the argument of counsel, and then found (1) that there was pending before the July 1950 Cook County grand jury a certain investigation known as Grand Jury Docket No. 96; (2) that a subpoena was issued by order of the Criminal Court directing the production of certain books and records of Tam O'Shanter Country Club, a corporation, and the truth to speak, concerning a certain complaint made before *said grand jury* against George S. May, forthwith; (3) that George S. May failed, neglected and refused to produce before the *said grand jury* the books and records of said corporation, as specifically designated in said subpoena; (4) that James Ryan has and had possession of said books and records of Tam O'Shanter Country Club, a corporation; (5) that said defendant, George S. May, failed, neglected and refused to demand of and obtain from said James Ryan the books and records of said Tam O'Shanter Country Club, a corporation, as specifically designated in said subpoena, or any part thereof, so as to produce said books and records, as specifically designated in said subpoena *duces tecum* before said grand jury for the July, 1950, Term; (6) that said neglect, failure and refusal to comply with the said subpoena was and is a wilful disobedience and defiance of the *process* of this court; (7) that by reason of said conduct of said defendant George S. May, said defendant is guilty of contempt of this court and punished therefore. (R. 13)

Defendant objected to the entry of said order and judgment, and moved to vacate and set it aside, which motion was overruled (R. 13, 14).

The Supreme Court of Illinois affirmed the judgment (R. 32, 33) November 27, 1951, and filed the opinion of the court (R. 24-32).

December 21, 1951, petitioner filed a petition for rehearing (R. 33), setting forth facts that were omitted from the opinion (R. 33-46), among which are (1) that on July 14, 1950, George S. May was formally charged upon the docket of the July 1950 grand jury with violations of specified sections of the Criminal Code, under Grand Jury Docket No. 96 (R. 35), (2) that it nowhere appears in the record that George S. May requested a subpoena to be issued for him, or that he be made a witness before said grand jury (R. 36), (3) that the corporation, Tam O'Shanter Country Club, was never served with the subpoena; that no return was ever made that the subpoena had been served upon the corporation, nor upon any officer of the corporation as such, nor upon defendant as an officer. (R. 38) (4) The petition for the subpoena did not request that any writ be issued for George S. May as an officer of said corporation nor did the order so provide. (R. 38); and that the omission to state or consider those and other facts renders the judgment of the Criminal Court, and its affirmance, a violation of the due process clauses of Article II, Section 2, of the Constitution of Illinois, and the Fifth Amendment, and Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 37).

In said petition for rehearing it is also pointed out wherein the Supreme Court of Illinois erred in conclusions of fact and law (R. 39-45).